

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

TX 2005-050292

11/27/2007

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT  
S. Brown  
Deputy

CIBOLA VISTA SPA AND RESORT LLC

K LAYNE MORRILL

v.

CITY OF PEORIA

ELLEN M VAN RIPER

**UNDER ADVISEMENT RULING**

**(Plaintiff's Motion For Summary Judgment On Division Of Sales Of Timeshare Interval Interest Between Real and Personal Property Interests Involved)**

The Court returns to the issue of allocating the purchase price of a timeshare which includes both real and personal property elements. Under PCC § 12-416, the City is limited to collecting a tax on the selling price of the improved real property, and consequently must exclude from the tax that portion of the selling price attributable to the personal property. This is not a deduction, as the City argues, but rather an exclusion from the scope of the tax. The difficulty presented in this case is in dividing for tax purposes a price which is not itemized.

Both parties attempt to appeal to the "essence" of the timeshare concept, Cibola Vista emphasizing the personal property aspects of this "essence" and the City emphasizing the real property aspects. Neither analysis is helpful. The real property must be taxed, the personal property must not be, regardless of whether the sale of one is indispensable to the sale of the other.

The parties have identified five categories of costs in dispute: interval exchange costs, day use privileges, concierge costs, marketing costs, and closing costs/sales commissions. The latter two are plainly costs of the sale of the combined real/personal package. The Court's minute entry of April 9 made it clear that costs such as marketing and overhead do not reflect benefits conferred upon the purchaser: they are not property at all. At the same time, the City's

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correct assertion that costs of doing business are not deductible misses the point that only the real property portion of the timeshare is taxable in the first place, so the rule merely prohibits deduction of these costs from the amount subject to the tax. There are two methods that might be applied to allocate these costs. One method is to apportion them between the real and personal elements in the same proportion as the entire sale is allocated (temporarily excluding these costs from the calculation). The other method is to determine the costs that would have been incurred in the sale of the real property elements and exclude the remainder as pertaining to the untaxed sale of personal property. The City has implicitly chosen the latter. Cibola Vista argues that the entirety of these costs should be excluded because they are more “extensive” [underlining in original] than similar costs for bare real property. Cibola Vista’s argument is not well founded. The City Council is presumed to have known what timeshares are and what their sale entails; it is not the function of the Court to second-guess it.

In purchasing interval exchange rights, the buyer is obtaining the right to use timeshares – whether real or some combination of real and personal, property -- outside the borders of the City of Peoria. In theory, then, the cost of these rights is not taxable; however, the amount has not yet been proven. The City’s objection that the cost of this service is incapable of precise determination does not change the fact that it must under the language of the ordinance be determined. Cibola Vista bases its computation on the results of an unscientific survey of its customers as to what percentages of the total they ascribe to each element and on its own estimation of the relative values of the various property elements. Whether this is the most appropriate method of performing the calculation is a matter for the fact-finder.

Many, if not all, of the rights enjoyed by purchasers to use facilities on a daily basis are not subject to the tax. Application of the Court’s prior orders provides a clear enough demarcation of whether rights in this category are real or personal.

The cost of concierge service is not subject to the tax. The City’s argument that such service is an expected cost of doing business as a timeshare operator is not persuasive: the ordinance limits the tax to the sale of real property, and the services of a concierge simply are not real property. Unlike some of the other categories, the cost of providing concierge service should be easy to ascertain: concierges are paid a certain amount, their equipment costs a certain amount. The contribution of the concierge to the selling price remains a difficult question. Given the ease of calculating the percentage the cost of concierge service bears to the total cost of the timeshare, it would appear that proportional allocation would simplify the computation of this element.

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Therefore, IT IS ORDERED:

1. Plaintiff's Motion For Summary Judgment is granted as to concierge services, subject to verification of the amount.
2. Plaintiff's Motion For Summary Judgment is denied as to the marketing costs, closing costs/sales commissions, interval exchange rights and in all other respects.
3. Setting a 2-day trial to the Court on **April 3, 2008 at 9:30 a.m.** Counsel may request a conference with the Court if this date is not available for counsel.
4. Vacating the telephonic trial scheduling conference set January 14, 2008.